IN THE

Supreme Court of the United States

October Term, 1974

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MICHAEL RODAK, JR., CLERK

No. 73-1741

ALFONSE PERSICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

JERRY LANGELLA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for a writ of certiorari, entered on October 21, 1974, and (2) granting the petition. As grounds for this motion, petitioner states the following:

On October 21, 1974, just before the order denying certiorari was entered in the instant case, Petitioner's Reply Brief was filed with this Court. Inasmuch as certiorari was denied without time for this Court to consider that brief, petitioner respectfully asks the Court to reconsider its denial of certiorari in light of the arguments raised therein. Accordingly, petitioner's reply brief is reproduced in its entirety, and appended hereto.

REPLY BRIEF FOR PETITIONERS

I.

Petitioner Persico's case is not moot.

Respondent, relying principally on *St. Pierre* v. *United States,* 319 U.S. 41 (1943), suggests that since petitioner Persico has been released after service of his sixty-day sentence for civil contempt, his case is moot. Respondent's reliance is misplaced and the contention is unsound.

The principle is well recognized that where it is not possible to bring a case to this Court before incarceration terminates, the case is not moot. See *Sibron* v. *New York,* 392 U.S. 40, 50-3 (1968). In the case at bar petitioner was ordered incarcerated for sixty days or until he purged the contempt, commencing on January 23, 1974. Notice of appeal was filed the following day and the Second Circuit denied bail on January 29. Counsel consented to an expedited briefing schedule in the Second Circuit Court of Appeals and that court rendered its decision on February 19, 1974, almost one month after petitioner's commitment began. Applications for a stay and bail pending certiorari were denied on March 7, 1974 by Mr. Justice Marshall, and on March 18, 1974 by the full Supreme Court. Petitioner was released several days later. Thus,

with denials of bail pending appellate litigation, the length of petitioner's sentence made it physically impossible to bring the case to this Court before his incarceration terminated. (Compare *Sibron* v. *New York, supra*, where a six month term was deemed an insufficient opportunity to bring the case to this Court.)

In addition, petitioner sought bail and a stay of the order of incarceration at every level. Respondent's suggestion that these efforts were insufficient because a renewed application for bail was not made in the Circuit Court, after its affirmance of the district court order, rings hollow. Since bail had been denied by that court before its decision on the merits, a second application after the Circuit had already rejected the appeal would obviously have been futile, producing only further delay in bringing the matter to this Court.

Respondent also suggests that this Court's denial of a stay was tantamount to a decision that the case was one which should be allowed to become moot. No such intent can or should be inferred from a denial of an application for a stay. Indeed, the denial of a stay can just as well be interpreted as a recognition that the case would not be moot under *Sibron*, and therefore a stay was unnecessary to preserve the issue for review. Moreover, since stay applications are generally not as thoroughly briefed as a petition for certiorari, it is not their function to decide the merits of an issue, even the merits of a mootness claim. See, e.g., *Locks* v. *Commanding General, Sixth Army*, 89 S. Ct. 31 (1968) (Op. of Mr. Justice Douglas).

Thus, unlike the petitioner in *St. Pierre, supra*, Persico exhausted every reasonable measure to obtain a stay, without which the length of his sentence made it impossible to bring his case to this Court before his incarceration expired. Under these circumstances, even *St. Pierre* recognizes that the concept of mootness does not apply.

In addition, and of equal significance in showing that this case is not moot, the government frankly concedes that "it is the government's present intention to recall petitioner before the grand jury if certiorari is denied" (Respondent's Brief, p. 7).

The Special September 1972 grand jury before which petitioner was subpoenaed was extended by Chief Judge Jacob Mishler on August 26, 1974, until March 19, 1975. Furthermore, 18 U.S.C. § 3331 permits application for an additional six-month extension, which could prolong the life of the grand jury to September 1975. If this case is held moot, petitioner would be resubpoenaed before the same grand jury and asked the same questions. He would then be recommitted and very likely released before being able to present his case to this Court, either because his term of incarceration, or the life of the grand jury, would have expired.

The nature of petitioner's commitment—civil contempt—leaves him open to the abuse of repeated incarceration for short periods with no redress to this Court; or so the goverment contends. But this contention is ill founded. The government's admission that it intends to resubpoena petitioner places this case in the category of continuing controversies where the concept of mootness does not apply. See, *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911); *Moore* v. *Ogilvey*, 394 U.S. 814 (1969). Nor would further proceedings in the district court flesh out the record in any respect. In short, further proceedings in the lower courts would be a waste of judicial time and energy, to say nothing about petitioner's loss of liberty. The correctness of this reasoning was espoused in *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972). There the term of the new jury had expired and appellants had been released from their *civil* incarceration during the pendency of their appeal. The court held that the case was not moot because of the importance of the issue presented and because the history

of the case "strongly suggests that the government will renew its efforts before another grand jury to obtain the information it sought to compel in the case before us." 466 F.2d at 1089. Far more than a suggestion in this case, the government concedes its intention to resubpoena petitioner.

In sum, whatever vitality the reasoning, in *St. Pierre* retains, this case falls within its clearly delineated exceptions, as set forth in *Sibron*, and satisfies every test for the existence of a true "case or controversy."

II.

Petitioner Langella's case is not premature.

Unlike Persico, Langella is still in custody for civil contempt. He petitions for certiorari directly from the order of the district court pursuant to 28 U.S.C. §§ 1254(1) and 2102(e), having filed a protective notice of appeal to the Second Circuit. The government has not seen fit to address his petition on the merits, claiming instead that his "only justification for seeking to bypass the court of appeals is the insufficient contention that his arguments are foreclosed by that court's decision in the case involving petitioner Persico" (Brief in Opposition, p. 3).

The respondent's argument has two prongs: first, that only one active circuit judge participated in the *Persico* decision and second, that in light of *In re Lochiatto*, 497 F.2d 803 (1st Cir., 1974), a decision in conflict with *Persico*, the Second Circuit might abandon the holding in *Persico*. No doubt through inadvertence respondent did not bring to this Court's attention the Second Circuit's holding in *In re Vigorito*, 499 F.2d 1351 (2d Cir. 1974), decided *after In re Lochiatto*, where it reaffirmed *Persico*. Participating in the panel which decided *Vigorito* were Judges

Hays and Lumbard, both active Circuit Judges. Thus, respondent's contention was laid to rest long before it was made in this Court. The suggestion that a decision is required from the Second Circuit before seeking certiorari for this incarcerated petitioner is utterly futile in light of the factual near-identity of the cases. Such a procedure could only increase the risk that Langella, who has been denied bail, will be released before this Court renders its decision; a situation which results in mootness in respondent's view. Respondent seeks to create the horns of a dilemma upon which to skewer Langella. No such result should be permitted. See *Nixon* v. *United States*, — U.S. —, 41 L. Ed. 2d 1039 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973).

III.

The petition for certiorari should be granted.

Before addressing the merits, it should be noted that respondent's statement of the issue is factually incorrect: "Whether a grand jury witness whose telephone conversations have been intercepted. . . ." The electronic surveillance of petitioner Persico's home was not limited to intercepting telephone conversations. Rather, his home was "bugged." The telephones were rendered inoperative from some location outside petitioner's home, resulting in a service call to the home. Petitioner was informed by the "repair man" that new phones were required. Two phones were installed, one in the kitchen and one in the basement den, which acted as transmitters of all conversations in the adjacent rooms whether or not the phones were actually in use.

Respondent acknowledges that the issue posed in this petition is "potentially one for resolution by this Court" and that a "limited conflict" exists between the ruling below and *In re Lochiatto*, *supra* (Brief in Opposition,

p. 14). Repsondent's sole justification for opposing the granting of certiorari is, in effect, that not enough confusion exists concerning the proper resolution of this issue. Respondent suggests that the other circuit courts of appeals be given more time to express their opinions. This reasoning should be rejected.

In the first place, the two circuits which have directly addressed the issue are already in direct conflict. Future decisions by other circuits cannot resolve it; they will, in all probability, only exacerbate the split. Moreover, the questions presented in this case have been in the wind since this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41 (1972), and the federal courts appeals are not alone concerned with these issues. Since 18 U.S.C. § 2515 applies, by its terms, to state grand juries, the state courts are likewise seeking resolution of these questions of federal statutory interpretation. See, e.g., *People* v. *Einhorn*, 45 A.D. 2d 75, 356 N.Y.S. 2d 620 (1974). Thus, quite literally, every court in the nation is concerned with a definitive resolution of these issues.

More and more the grand jury and electronic interception are the favored implements of law enforcement. The two in combination pose truly frightening threats to personal liberty. Grand jury investigations are frequently substitutes for untenable criminal prosecutions. Witnesses are held in civil contempt, without indictment, without rights of confrontation, without jury trial and usually without bail, sometimes for years.* Under decisions such as *Persico*, all this is accomplished without the slightest benefit of the adversary system to establish a statutory defense. In short, the importance and significance of this issue to

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* 18 U.S.C. §§ 3331, et seq., provides for special grand juries with terms of up to three years. Compare Rule 6(g) Fed. R. Crim. P. also see, *Korman* v. *United States*, 486 F.2d 926, 933 (7th Cir. 1973).

the administration of justice throughout the nation cannot be underestimated.

Finally, this case presents the issue in the crispest possible terms. The government has admitted the existence of electronic surveillance, and that its questioning is predicated on it. The witness has asserted his statutory rights to test the legality of that surveillance in defense to a civil contempt proceeding. What those rights are is an issue which should be decided by this Court and should be decided now.

CONCLUSION

For the reasons set forth above as well as those contained in the petition for a writ of certiorari, petitioners pray that this Court grant rehearing on the order of denial, vacate that order, grant the petition and review the judgments and opinion below.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioners, I hereby certify that this petition for re-hearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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